No. 03-709

Supreme Court, U.S.
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In The
Supreme Court of the United States

CIGNA HEALTHCARE OF CALIFORNIA, INC.,

Petitioner,

vs.

MUZEYYEN BALABAN-ZILKE, Ph.D.,
INDIVIDUALLY AND AS
SUCCESSOR-IN-INTEREST TO BRAD ZILKE,

Respondent.

On Petition For A Writ Of Certiorari
To The California Court Of Appeal,
For The Second Appellate District, Division Four

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1) Whether Section 2 of the Federal Arbitration Act [*9 U.S.C. §2*] allows a State to create a standard that can revoke any contractual provision "upon such grounds as exist at law or equity" in order to secure a constitutional Due Process right to be offered a choice, in contracts of adhesion, between retaining the inalienable and sovereign right of access to courts and juries, or to voluntarily elect to waive such right in favor of private binding arbitration, thereby preventing the involuntary imposition upon the weaker party of mandatory arbitration alone?

2) Whether a Federal statutory preference for arbitration may supercede one's choice to retain his/her superior and inalienable constitutional right to court and jury access?

3) Whether *California Health & Safety Code §1363.1*, a statute regulating the business of insurance pursuant to the McCarran-Ferguson Act, reverse preempts the Federal Arbitration Act?

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Black's Law Dictionary (7th ed. 1999) 12

William Blackstone, *Commentaries on the Law of England* (London, 1st ed., 1765) 5, 18

Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Helen E. Veit et al. eds. 1991) 17

Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 Cardozo L. Rev. 1361 (2003) 25

Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 Harv. J. on Legis. 281 (2002) 18, 25

John P. Kaminski, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights, 1787-1792*, 33 Santa Clara L.Rev. 887 (1993) 9

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Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure (3rd ed. 1999) 3

The American Heritage College Dictionary (3d ed. 1993) 12

The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Penn. Ratification Debates (Jonathan Elliot ed., Reprint ed., Ayer Co. 1987) 16

The Federalist (Clinton Rossiter ed., 1961) ..... *passim*

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STATEMENT OF THE CASE

Muzeyyen Balaban-Zilke, Ph.D. was a Los Angeles County employee at all times relevant herein. As a benefit of her employment with the County of Los Angeles, she was annually offered six health care plans by her employer. With the approval of her governmental employer, none of these health care plans offered her a choice between retaining the State civil jury right or waiving it in favor of binding arbitration. Rather, all health care plans offered to each and every County employee, including the CIGNA plan chosen by Balaban-Zilke, required the signing of a mandatory arbitration clause. Despite Balaban-Zilke's entitlement to health care coverage as a benefit of employment, no such coverage could be offered to any County employee unless all 80,000 County employees agreed to mandatory arbitration. No County employee was allowed to reserve, nor was any County employee, including Balaban-Zilke, informed of his/her right to reserve, without forfeiture of entitled benefits, the civil jury guarantee when enrolling in any County-offered health care plan. Part of the State Court record is a declaration under penalty of perjury by a Los Angeles County supervisor which states that despite an entitlement to health care coverage, no such coverage could be offered to any County employee unless each employee agreed to *mandatory* arbitration. (Declaration of Nidu Permaul, Respondent's App. 1); (Domestic Partner Enrollment and Change Form, Respondent's App. 5); (Declaration of Muzeyyen Balaban-Zilke, Respondent's App. 8). Petitioner CIGNA concedes that Respondent "could not have obtained coverage" without signing a mandatory arbitration clause. (Pet. brief at page App. 16).

ARGUMENT

I. THE FOURTEENTH AMENDMENT DUE PROCESS RIGHT, AND THE NINTH AND TENTH AMENDMENTS, GUARANTEE PARTIES TO CONTRACTS OF ADHESION THE RIGHT TO CHOOSE RETENTION OF COURT/JURY ACCESS OR TO WAIVE THIS RIGHT IN FAVOR OF BINDING ARBITRATION

California *Health & Safety Code §1363.1* mandates that health care plans "shall include" a minimum standard of disclosure concerning the waiver of one's constitutional right to jury. This minimum disclosure empowers the prospective enrollee to exercise a constitutional right to choose a competing health care plan that does not mandatorily impose arbitration as the lone form of administering justice. This constitutional right to choose was totally denied to Muzeyyen Balaban-Zilke because all health care plans offered to her by her governmental employer contained mandatory arbitration clauses. Petitioner CIGNA concedes that Respondent "could not have obtained coverage" without signing a mandatory arbitration clause. (Pet. brief at page App. 16). *See also*, (Declaration of Nidu Permaul, Respondent's App. 1); (Domestic Partner Enrollment and Change Form, Respondent's App. 5); (Declaration of Muzeyyen Balaban-Zilke, Respondent's App. 8).

Respondent contends that she had an individual reserved right to exercise her conscience, without inapposite compulsion or restriction, to choose to retain her right to court and jury access in the event of a yet unknown future dispute with CIGNA. It is also her contention that no other natural or artificial citizen can condition an unguaranteed economic benefit on the involuntary surrender, without choice, of a superior and inalienable individual political liberty. The exercise of this right of conscience is freely "beyond the legitimate reach of sovereignty" or government. James Madison on Sovereignty (1835), 9 *The*

Writings of James Madison, at 570-1 (Gaillard Hunt ed.) (1910).

"The Supreme Court has considered only one instance of a contractual waiver of due process rights in a commercial setting." 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 162 (3rd ed. 1999).

In *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972):

> [T]he Court upheld a waiver of process clause which had been negotiated in a contract between two independent businesses. However, the Court did not indicate that it would be willing to uphold such waivers of process when it was unclear if the parties had truly bargained over the provision. Thus the validity of form contract provisions by which one party waives his rights to notice or process remains an open question. If the Court were to apply the 'knowing and intelligent' waiver standard of the criminal cases it would be virtually impossible to uphold such provisions where the parties were of clearly unequal bargaining strength or where there was no real attempt to inform the debtor [or other weaker party] of the meaning of the provision.

3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law; Substance and Procedure 162 (3rd ed. 1999).

As noted by this Court in *Overmyer*, "where the contract is one of adhesion, where there is great disparity in bargaining power . . . other legal consequences may ensue" to make unenforceable forced waivers of due process rights. 405 U.S. at 188.

An individual's Fourteenth Amendment due process right in favor of liberty of choice does not extend to corporations like CIGNA, and hence is superior to any lesser right upon which CIGNA claims preemption. As one

district court recently noted when distinguishing between an individual's liberty interest and a corporation's procedural due process right: "'[c]orporations do not have fundamental rights; they do not have liberty interests, period.' *Nat'l Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1129 (7th Cir.1995). Corporations do have property interests, however, that may be protected by procedural due process." *R.J. Reynolds Tobacco Co., et al. v. Bonta, et al.*, 272 F.Supp.2d 1085, 1111 (2003).

A. THE CONSTITUTIONAL RIGHT TO CHOOSE

Recently, this Court found that one's due process liberty right extended to a right of choice in the area of private sexual relationships beyond the ability of government to regulate. *Lawrence v. Texas*, ___ U.S. ___, 123 S.Ct. 2472, 2478, 2481, 2483 (2003).

Under our Constitution "[t]he people . . . cede . . . [only] some of their natural rights" to government. The Federalist No. 2, at 37 (John Jay) (Clinton Rossiter ed., 1961). This Court has found that "the opinion of the Federalist has always been considered as of great authority" *Cohens v. Virginia*, 19 U.S. 264, 418 (1821). In addition, "government is instituted no less for protection of the property than of the persons of individuals." The Federalist No. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961)

Natural rights of freedom and liberty have traditionally been based upon the notion of a birthright which is not absolutely surrendered to government and which takes priority over property rights in the event of a direct and unavoidable conflict. For instance, a former slaveholder's loss of property and increased financial obligation to economically compensate former slaves following the ratification of the Thirteenth Amendment could not support a claim for breach of contract or indemnity: "any

claim for the loss of emancipation of any slave . . . shall be held illegal and void." *U.S. Const. Amend. XIV, §4.*

Similarly, the common law during the Founding Era distinguished between commercial rights and obligations, on the one side, and natural rights, on the other side, based upon a notion that the former was related to the consent of a limited number, such as merchants, while the latter was related to the consent of the people at large. More specifically, the common law in 1791 expressly stated that economic "special customs," such as "the custom of merchants," must fall or be narrowly construed when "in derogation of the common law," because the common law reflected the consent of all of society, while "special customs" only reflected the consent of a limited economic class, i.e., merchants. 1 William Blackstone, *Commentaries on the Law of England* 78 (London, 1st ed., 1765); reprinted (Stanley N. Katz introduction, University of Chicago Press, 1979); *see also, id.* at 73.

This concept of liberty interests preempting property interests in the event of a direct and unavoidable conflict can also be found in James Madison's view that the states, rather than the federal government, would remain the primary venue for protecting individual liberties. For instance, the federal government "will be exercised principally on external objects, as war, peace, negotiation and foreign commerce" while the "numerous and indefinite" powers reserved to the several states "will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 292-3 (James Madison) (Clinton Rossiter ed., 1961).

According to James Madison, the "meaning of the power to regulate commerce is to be sought in the general use of the phrase." In this regard, there was an "external

object" as to why the states did not intend to "annihilate" the federal interstate commerce power, and this external object was to not "disarm the nation from protecting occupations and establishments, important to its defense and independence, against the subversive policy of foreign Rivals or Enemies." Letter from James Madison to Joseph C. Cabell (Mar. 22, 1827), 9 *The Writings of James Madison*, at 284-5 (Gaillard Hunt ed.) (1910).

Madison later wrote that the purpose of the U.S. Constitution was to give "all the attributes of a national government in its relations with other Nations, including the most essential one, of regulating foreign Commerce . . . " Letter from James Madison to John Tyler (1833), 9 *The Writings of James Madison*, at 509 (Gaillard Hunt ed.) (1910).

During the ratification debates over the U.S. Constitution, Madison wrote that without the interstate commerce clause, "the great and essential power of regulating foreign commerce would have been incomplete and ineffectual." The Federalist No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961). As to the protection of civil liberties, the states would retain "a residuary and inviolable sovereignty." The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

When drafting the Constitution, Roger Sherman, the only Founder to sign all four major founding instruments, acknowledged the purpose behind the interstate commerce clause when declaring that "the oppression of the uncommercial states was guarded against by the power to regulate trade between the States." 2 *The Records of the Federal Convention of 1787*, at 308 (Max Farrand ed., 1937) (reprinted Yale University Press, 1966).

The intent of the interstate commerce clause, the basis for the Federal Arbitration Act, was to prevent economic jealousies between states when acting in their

corporate capacities; a capacity unrelated to the protection of the reserved liberty relationship between the individual and any government.

In other words, the Founders did not intend to empower the federal government to use economic laws arising out of the commerce power, the primary end of which was to advance foreign policy and prevent related interstate jealousies, as a means to "annihilate" otherwise preexisting and "domestic" individual political liberties. It was this political view that caused Madison to note that while the majority, when exercising powers of sovereignty, "may do anything that could be *rightfully* done by the unanimous concurrence of the members; *the reserved rights of individuals* (of conscience for example) in becoming parties to the original compact *being beyond the legitimate reach of sovereignty*, wherever vested or however viewed." (emphasis added) James Madison on Sovereignty (1835), 9 *The Writings of James Madison*, at 570-1 (Gaillard Hunt ed.) (1910). For this reason, CIGNA cannot argue, even implicitly, that the FAA majority faction can sacrifice "the public good and the rights of other citizens." The Federalist No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

Consistent with one's reserved right to freely exercise his conscience, including the subject right to choose, is our republican premise that justice, not property, "is the end of government . . . the end of civil society." Justice must be deemed the proper end of government, otherwise "the stronger faction can readily unite and oppress the weaker." The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

B. CIGNA EXERCISED ITS PROCEDURAL RIGHT TO REJECT JURY TRIAL BUT DENIED, WITH APPROVAL BY A GOVERNMENTAL EMPLOYER, RESPONDENT'S SUBSTANTIVE DUE PROCESS RIGHT TO CHOOSE

In the instant matter, although its corporate status disqualified it from possessing fundamental liberty interests, CIGNA nevertheless made its own unilateral choice to either retain the civil jury or surrender it in favor of a mandatory arbitration clause. CIGNA chose to surrender the civil jury. However, CIGNA and all other health care plans did not reciprocate with regard to all Los Angeles County employees, including Respondent. No choice was offered by these health care plans to these 80,000 employees, who did possess fundamental liberty interests, including the right to choose court and jury access in the event of injuries caused by the unreasonable denial of medically necessary care. (Declaration of Nidu Permaul, Respondent's App. 1); (Domestic Partner Enrollment and Change Form, Respondent's App. 5); (Declaration of Muzeyyen Balaban-Zilke, Respondent's App. 8). Petitioner CIGNA concedes that Respondent "could not have obtained coverage" without signing a mandatory arbitration clause. (Pet. brief at page App. 16).

No artificial corporation in the business of marketing contracts of adhesion in health care should be allowed the power to condition this mere contractual benefit on the coerced surrender by the individual enrollee of an inalienable political right to choose court and jury access. To do so is worse than illegal consideration, it is unconstitutional consideration. As noted by James Madison, "power wherever lodged, is liable more or less to abuse." Letter from James Madison to Thomas Lehre (Aug. 2, 1828), 9 *The Writings of James Madison*, at 315 (Gaillard Hunt ed.)

(1910). This absence of choice unconstitutionally denies a right to mutuality of consent.

C. CHOICE IS A RETAINED RIGHT OF SOVEREIGNTY

The Ninth Amendment to the United States Constitution acknowledges that unenumerated rights are "retained by the people." The Tenth Amendment to the United States Constitution acknowledges that undelegated powers "are reserved to the states respectively or to the people." By this is meant that "the real parties to the constitutional compact of the United States are the *States* – that is, the people thereof respectively in their sovereign character, and they *alone* . . ." (emphasis in the original). Outline of James Madison (Sept. 1829), 9 *The Writings of James Madison*, at 352 (Gaillard Hunt ed.) (1910). *See also, id.* at 356. Stated differently, "the Constitution was created by the people, but by the people as composing distinct States, and acting by a majority in each." The "sovereign or supreme powers of the Government are divided into the separate depositories of the Government of the U.S. and the Government of the individual States." Letter from James Madison to M.L. Hurlbert (May 1830), 9 *The Writings of James Madison*, at 373 (Gaillard Hunt ed.) (1910). Not even the treaty power enables the federal government to change the domestic republican character of our state and federal governments, because the people did not delegate, but rather retained, such unlimited powers.

As observed by the editor of The Documentary History of the Ratification of the Constitution, the purpose behind amending the Constitution, including its interstate commerce clause, was to "clarify the federal-state relationship and guarantee the rights of individuals." John P. Kaminski, *Restoring the Grand Security: The Debate Over*

a Federal Bill of Rights, 1787-1792, 33 Santa Clara L.Rev. 887, 903 (1993) (citing to Bernard Schwartz, 2 *The Bill of Rights: A Documentary History*, 762 (1971)).

In short, the FAA recognizes the powers delegated to the States by the Ninth and Tenth Amendments to the U.S. Constitution. Thus, the FAA confirms the States' constitutional power to revoke commercial provisions "upon such grounds that exist at law or equity" [*9 U.S.C. §2*] *not* because of a will to discriminate against arbitration per se, but because of a will to deter the involuntary, unknowing or "mandatory" surrender, without choice, of any superior and state guaranteed individual political liberty.

Protecting an individual's right of choice in order to avoid an involuntary, coerced and unknowing forfeiture of that right in contracts of adhesions does not impact (because it is conceptually unrelated to) interstate commerce, particularly considering the state's exclusive jurisdiction in determining whether subscriber fees charged for an enrollee's reservation of the civil jury right are, for example, actuarially sound. *California Health & Safety Code §§1389.2, 123205*. Moreover, "equity abhors a forfeiture." 11 B.E. Witkin, *Summary of California Law* (9th ed.), Equity §18 at 695 (1990); *see also, Cal. Civ. Code §3275*.

Relying, in part, on California authority, the Ninth Circuit recently invalidated an arbitration clause on the grounds that it was oppressive and unconscionable given the fact that it was imposed, without choice of retaining court and jury access, under the threat of dismissal from employment:

> a meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice. At a minimum, a party . . . must have an actual, meaningful, and reasonable choice to exercise that discretion. In

> light of Circuit City's insistence that Mantor sign the arbitration agreement – under pain of forfeiting his future with the company – the fact that in 1995 Mantor was presented with an opt-out form does not save the agreement from being oppressive, for Mantor had no meaningful choice, nor any legitimate opportunity, to negotiate or reject the terms of the arbitration agreement . . . Accordingly, because Circuit City presented the arbitration agreement to Mantor on an 'adhere-or-reject' basis we conclude that the arbitration agreement was procedurally unconscionable.

Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1106-7 (2003).

California courts have acknowledged that "the purpose of arbitration is to *voluntarily* resolve private disputes . . ." [emphasis added] *Broughton v. CIGNA Healthplans*, 21 Cal.4th 1066, 1080, 90 Cal.Rptr.2d 334, 344 (1999). In order for consent to a contract to be valid, it must be "free, mutual and communicated by each to the other." *Cal. Civ. Code §1565*. Respondent contends that her due process right empowers state courts to find ways to invalidate contracts that deny one the choice to freely retain inalienable liberties, rather than being compelled to waive them in favor of an unguaranteed and inferior replacement, whatever the nature may be of that replacement.

California's Constitution expressly declares that the rights guaranteed by it "are not dependent on those guaranteed by the United States Constitution." *Cal. Const. art. 1, §24*. It also states that its "declaration of rights may not be construed to impair or deny others retained by the people." *Id.*

Unlike the federal constitution, the California Constitution embraces the word "inalienable" when expressly declaring under its Declaration of Rights that "all people

are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Cal. Const. art. 1, §1.* Under its Declaration of Rights, the California Constitution also guarantees one's right to a civil jury as being "inviolate," and without any qualifying reference to the common law. *Cal. Const. art. 1, §16.*

D. "MANDATORY" IS "DICTATORY"

Under California law, the state may not punish a criminal defendant for the exercise of a constitutional right to a jury, or promise leniency to a defendant for refraining from the exercise of that right, whether the source of such coercion is executive, legislative, or judicial in nature. *People v. Collins*, 26 Cal.4th 297, 299, 109 Cal.Rptr.2d 836, 842 (2001). The basis of this decision was to assure that any waiver of a constitutional right must be done freely, voluntarily, knowingly, and without compulsion. *Accord, D.H. Overmyer Co., Inc v. Frick Co.,* 405 U.S. 174 (1972). Contrary to this rationale is the notion of *mandatory* arbitration in the civil sector.

"Mandatory" means "required or commanded by authority; obligatory," The American Heritage College Dictionary 823 (3d ed. 1993), or "of, relating to, or constituting a command; required; preemptory." Black's Law Dictionary 973 (7th ed. 1999). In other words, "mandatory" connotes that one does not have a choice to retain even a preexisting "inalienable" and "inviolate" political right. For this reason, *mandatory* arbitration violates Respondent's constitutional due process right to be offered a choice between jury or arbitration before freely choosing one over the other, especially when enforced by government. Any legislative attempt to abridge the constitutional right to trial by jury is void. *See, People v. One 1941 Chevrolet*

Coupe, 231 P.2d 832, 835, 37 Cal.2d 283, 287 (1951). The "discrimination" at issue is not against arbitration per se, but rather against the mandatory, unknowing and involuntary nature of its imposition.

In protecting an individual's inviolate state constitutional right to a civil jury in real estate contracts of adhesion, California courts have invalidated as unconscionable "judicial reference" alternatives to the civil jury whenever home-buyers are offered this inferior and unguaranteed alternative in the presence of "little choice," i.e., through a "take-it-or-leave-it proposition." *Pardee Const. Co. v. Superior Court*, 123 Cal.Rptr.2d 288, 292-3, 100 Cal.App.4th 1081, 1087 (2002).

Recently, the California Supreme Court struck down a binding arbitration clause on the premise that a governmental entity was denied choice, framing the issue as follows: "the issue is not whether a county may *voluntarily* submit compensation issues to arbitration, . . . but whether the Legislature may *compel* a county to submit to arbitration *involuntarily*." [emphasis added] *County of Riverside v. Superior Court,* 132 Cal.Rptr.2d 713, 718, 30 Cal.4th 278, 284 (2003). In addition, the California Supreme Court also relied upon *Art. 11, §11*, of the California Constitution which states that "[t]he Legislature may not delegate to a private person or body power . . . to levy taxes . . . or perform municipal functions." *County of Riverside,* 132 Cal.Rptr.2d at 724, 30 Cal.4th at 291.

Respondent contends that delegating the administration of justice to a mandatory arbitrator without first offering to the enrollee a choice to retain the civil jury right, is violative of the Respondent's due process right to choose jury waiver voluntarily, freely, knowingly and without compulsion. Furthermore, the administration of justice via the resolution of private disputes is a traditionally public "municipal function."

Mandatory arbitration without choice unconstitutionally forces enrollees to be double taxed: first with a tax for a court system that has been denied them; second with a "tax" in the form of an arbitrator fee to replace an otherwise free Superior Court judge. Lastly, to enforce *mandatory* arbitration, when compelled without choice, would adopt the anti-republican model of tyranny given the concentration of all three branches of government into the hands of one mandatory arbitrator, whose errors in fact or law are not reviewable in the California Superior Courts. *See, Moncharsh v. Heily & Blase*, 10 Cal.Rptr.2d 183, 184, 188, 200, 3 Cal.4th 1, 6, 11, 28 (1992). "The accumulation of all powers legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

E. CALIFORNIA FORBIDS THE ASSIGNMENT OR OTHER ALIENATION OF INTANGIBLE INTERESTS

In California, contract claims are assignable, but personal tort claims are not. *Murphy v. Allstate Ins. Co.*, 132 Cal.Rptr. 424, 427, 17 Cal.3d 937, 942 (1976). In relation, *mandatory* arbitration in this contract of adhesion unconstitutionally violated Respondent's similarly intangible due process right to choice by forcing an assignment of the administration of justice away from civil courts and juries and toward a mandatory arbitrator, without any constitutionally equal consideration being received by the enrollee. It is the position of the Respondent that the right to choose between civil jury and non-mandatory arbitrator is a right of conscience that is constitutionally immune from forced alienation. To believe otherwise is to believe that our guaranteed individual liberties are no longer priceless, inalienable and inviolate.

California recognizes certain basic and general notions of due process fairness that place the preservation of fundamental political rights above all else when those rights are threatened. While arbitration in and of itself does not threaten California liberties, *mandatory* arbitration does by denying choice.

If this Court accepts the premise that the powerful party in a contract of adhesion cannot compel (by denying choice) the weaker party to surrender a constitutional right to jury, then the meanings of certain maxims of California jurisprudence are not denigrated. For instance, "one must so use his own rights as not to infringe upon the rights of another." *Cal. Civ. Code §3514.* "No one should suffer by the act of another." *Cal. Civ. Code §3520.* "No one can take advantage of his own wrong." *Cal. Civ. Code §3517.* "[A] law established for a public reason cannot be contravened by a private agreement." *Cal. Civ. Code §3513.* "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." *Cal. Civ. Code §1708.* "[E]very person has . . . the right of protection . . . from personal insult . . ." *Cal. Civ. Code §43.* "The law respects form less than substance." *Cal. Civ. Code §3528.* "All political power is inherent in the people. Government is instituted for their protection, security, and benefit . . ." *Cal. Const. art. 2, §1.* "A citizen or class of citizens may not be granted privileges or immunities not granted on the terms to all citizens." *Cal. Const. art. 1, §7(b).* "The sovereignty of the state resides in the people thereof . . ." *Cal. Gov. Code §100.* "When the reason of a rule ceases, so should the rule itself." *Cal. Civ. Code §3510.*

F. MANDATORY ARBITRATION IS NOT AN ALTERNATIVE NEUTRAL FORUM BECAUSE IT LACKS ANY RESIDUUM OF SOVEREIGNTY

Given the denial of choice, mandatory arbitration does not constitute an alternative neutral forum because a mandatory arbitrator does not reflect divided and checked power, a hallmark of republican government, nor does he possess any constitutional and residuary element of sovereignty. Hence, the enrollee does not receive any constitutionally equivalent consideration at the moment of forfeiting constitutional rights for a mere economic benefit.

James Wilson noted that the civil jury right had "a superiority over any other mode" in the administration of justice. He knew "no mode of investigation equal to that by a jury: they hear everything that is alleged; they not only hear the words but they see and mark the features of the countenance; they can judge of weight due to such testimony; and moreover, it is a cheap and expeditious manner of distributing justice. There is another advantage annexed to the trial by jury; the jurors may indeed return a mistaken or ill-founded verdict, but their errors cannot be systematical." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Penn. Ratification Debates 516 (Jonathan Elliot ed., Reprint ed., Ayer Co. 1987).

Wilson also wrote that every citizen, when acting as a juror, "forms a part of the sovereign power." 1 *The Works of James Wilson* 73 (Robert Green McCloskey ed., 1967). This is so because "the supreme or sovereign power of the society resides in the citizens at large." *Id.* at 77. In the administration of justice, sovereignty is "partly delegated [to judges] and partly retained" by the sovereign people as jurors. *Id.* at 174, 2 *The Works of James Wilson* 547 (Robert Green McCloskey ed., 1967). Jurors realize the

maxim that "a free people are governed by laws, of which they approve." 1 *The Works of James Wilson* 179 (Robert Green McCloskey ed., 1967). Precedent to approval is choice. Because jurors possess that residuum of sovereignty that is "supreme, arbitrary, absolute, uncontrollable," 2 *The Works of James Wilson* 506 (Robert Green McCloskey ed., 1967), they serve as a "check" against the "esprit du corps" of judges. *Id.* at 541-2.

To avoid the "esprit du corps" of arbitrators, Wilson explained that only *post-dispute* "arbitrations might be as valid as the judgments of courts," so long as the parties "sign a reference of the matter in controversy to the peace makers so chosen," and the reference is "ratified by the county court." *Id.* at 471.

Wilson's federalist view of sovereignty was reflected in the drafting history of the Tenth Amendment relative to the addition of the phrase "or to the people." This phrase was added and approved over an objection that it "tended to create a distinction [which it did] between the people and their legislatures." *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 193, 199 (Helen E. Veit et al. eds. 1991).

When proposing the civil jury and other "great rights of mankind" before the First Federal Congress, Madison acknowledged that the primary cause of disaffection with the Constitution was that it did not contain any "effectual provision against encroachments on particular rights, and those safeguards which they have been long accustomed to have *interposed between them [as sovereign] and the magistrate who exercised [by delegation] the sovereign power*." (emphasis added) *Id.* at 79.

Similarly, Richard Henry Lee, the former President of Congress, observed that the administration of justice without guaranteed civil jurors was the first "step towards establishing aristocracy [as the sovereign]; the most

oppressive of all governments." Richard Henry Lee, Esq., *Virginia Gazette*, Dec. 22, 1787; [reprinted in 5 *The Complete Anti-Federalist* 114 (Herbert J. Storing ed., 1981)], (borrowing from 3 William Blackstone, *Commentaries on the Law of England* 379-80 (London, 1st ed., 1765)); reprinted (Stanley N. Katz introduction, University of Chicago Press, 1979).

United States Senator Russell D. Feingold, Chair of the Subcommittee on the Constitution of the Senate Committee on the Judiciary, has also recently pronounced the profound constitutional distinction "between arbitration that is 'mandatory' and 'voluntary.'" Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 Harv. J. on Legis. 281, 283 (2002).

It is common knowledge that private retired judges, charging $5,000 to $7,500 per day, receive all of their repeat business not from consumers, but from businesses. This self-interest is inconsistent with the people's declared expectation of impartiality.

As one unanimous California Court of Appeal observed in an opinion ordered depublished:

> [T]he public purse-strings remain tightly knotted while litigants are given the privilege of paying twice – first through taxation, then again through a user's fee disguised as payment for a referee [or other private judge] . . . [O]ur courts are experiencing the wholesale departure of judges from the public system to the greener pastures of private judging, where they can and do earn more money, receive more help, obtain better accommodations, and work as many or as few hours as they choose.
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> * * *
>
> [W]e are too fast approaching the time when the law, in its majestic equality, will forbid the poor from using not only a private system restricted to

> the wealthy, but also the public system theoretically available to all.

McMillan v. Sup. Ct., 57 Cal.Rptr.2d 674, 680-1 (1996).

The California Supreme Court noted that "various studies show that arbitration is advantageous to employers . . . because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system." (citations omitted). *Armendariz v. Foundation Health,* 99 Cal.Rptr.2d 745, 768, 24 Cal.4th 83, 115 (2000).

Our Founders realized that the appearance of self-interest can and will jeopardize the public good, including the ability to preserve reserved rights of sovereignty and freedom of conscience. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity." The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). A mandatory arbitrator's self-interest in protecting and promoting repeat business is at least apparent.

Every American must have the right to retain and choose a sovereign form of justice administration that has been deemed by our Founders to be the most impartial. It was the Framers' intent to maintain the civil jury as the cheapest, most expeditious and most impartial method of administering justice. It was not their intent to have a self-interested form of arbitration, unchecked by the sovereign, replace the civil jury system as the favored, cheapest, most impartial and most expeditious form of justice. The republican answer lies in the simplification of civil procedure and jury trials, not in the latter's compelled annihilation by *mandatory* arbitration.

II. CALIFORNIA HEALTH & SAFETY CODE §1363.1 IS A STATUTE THAT REGULATES THE BUSINESS OF INSURANCE PURSUANT TO THE MCCARRAN-FERGUSON ACT AND THEREFORE REVERSE PREEMPTS THE FEDERAL ARBITRATION ACT

Pursuant to the FAA, voluntary agreements to arbitrate matters concerning interstate commerce are enforceable. However, reverse preemption under McCarran-Ferguson creates an important exception to this general rule, and this case falls squarely within that exception. The McCarran-Ferguson Act grants to each state the authority to regulate the business of insurance, including the circumstances under which an insurance company may, if at all, force its policyholders into compulsory arbitration. Moreover, McCarran-Ferguson forbids encroachment on that state control by federal legislation of general applicability, including the FAA. California law mandates that arbitration clauses in insurance agreements conform to the standard set forth in *California Health & Safety Code §1363.1.* Compelling arbitration under the FAA would impair California's laws regulating insurance, and thus the FAA's preemption of state law is itself reverse preempted by McCarran-Ferguson. This Court has previously denied certiorari on this exact issue. *Smith v. PacifiCare Behavioral Health of California, Inc.*, 93 Cal.App.4th 139, 113 Cal.Rptr.2d 140 (2001), *cert. denied*, 537 U.S. 818 (2002).

The Federal Arbitration Act creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. *See, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983). The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation

of any contract." *9 U.S.C. Section 2.* Normally, the FAA preempts a conflicting state law that prohibits arbitration.

However, the court must consider the impact of the McCarran-Ferguson Act, which was enacted to "restore the supremacy of the state in the realm of insurance regulation." *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). "[N]o Act of Congress shall be construed to invalidate, impair or supercede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance . . ." *15 U.S.C. Section 12(b).* The courts have found that the McCarran-Ferguson Act reflects "firm congressional intent to leave regulation of the insurance industry primarily to the states." *Steffens v. National Distillers and Chemical Corp.*, 69 F.3d 1226, 1228 (2nd Cir. 1995). "It is clear . . . that by this legislation, the congress established a public policy on the part of the national government to refrain from interfering with the regulation and taxation of insurance companies by the several states." *U.S. v. Sylvanus*, 192 F.2d 96, 100 (7th Cir. 1951). "Obviously, Congress' purpose was broadly to give support to the existing and future state systems of regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 66 S.Ct. 1142, 1154 (1946). In reviewing state regulations there is a "reluctance to disturb state regulatory schemes." *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 68 (1959). In short, the act "indicates the special status of insurance in the realm of state sovereignty." *Munich American Reins. Co. v. Crawford*, 141 F.3d 585, 595 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 539 (1998).

The McCarran-Ferguson Act reverses the usual preemptive effect of federal law. *Fabe*, 508 U.S. at 500; and *Munich Amer. Reinsur. Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998). In the narrow range of cases involving

state regulation of the insurance industry McCarran-Ferguson clothes state legislation in federal garments. *Id.* Absent a Congressional act specifically relating to the business of insurance, McCarran-Ferguson provides that state law controls over conflicting federal legislation. *Id.*

California Health & Safety Code §1363.1 states in relevant part:

> Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, *the right to a jury trial* shall [at a minimum] include, in clear and understandable language, a disclosure that meets all of the following conditions . . . [t]he disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically . . . to settle claims of medical malpractice . . . [t]he disclosure shall appear as a separate article . . . prominently displayed on the enrollment form to be signed by each . . . enrollee . . . [t]he disclosure shall clearly state whether the . . . enrollee is waiving . . . *a jury trial* for medical malpractice, other disputes relating to the delivery of service . . . or both, and . . . shall be displayed immediately before the signature line provided . . . for the individual enrolling . . . (emphasis added).

Does California Health & Safety Code §1363.1 preempt the general application of the FAA under McCarran-Ferguson? For the reasons stated below, the answer is yes.

As construed by this Court, McCarran-Ferguson "precludes application of a federal statute in the face of state law when: (A) the federal statute is one of general applicability rather than one specifically related to the business of insurance; (B) the state statute regulates the business of insurance; and (C) application of the federal statute would invalidate, impair or supercede the state's law. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999).

A. THE FAA IS A LAW OF GENERAL APPLICABILITY

The FAA is a federal measure not specifically related to insurance. *Davister Corp. v. United Republic Life Insurance Company*, 152 F.3d 1277, 1279 n.1 (10th Cir. 1998); "no one disputes the fact that the FAA does not specifically relate to insurance." *Stephens v. American Intl. Ins. Co.*, 66 F.3d 41, 44 (2nd Cir. 1995).

B. CALIFORNIA'S MANDATORY DISCLOSURE OF WAIVER OF THE CONSTITUTIONAL RIGHT TO COURT AND JURY ACCESS IS A STATE LAW REGULATING THE BUSINESS OF INSURANCE WITHIN THE MEANING OF THE MCCARRAN-FERGUSON ACT

In determining if a state law regulates the business of insurance, this Court has found three factors relevant: 1) whether the practice [state law] has the effect of transferring or spreading a policyholder's risk; 2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and 3) whether the practice is limited to entities within the insurance industry. *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358, 367 (1999). The three factors are "considerations [to be] weighed" in determining whether a state law regulates insurance and "[n]one of these criteria is necessarily determinative in itself." *Id.* at 373. The factors are checking points or guide posts, not separate essential elements. *Id.* at 374. All the factors need not point in the same direction. *Id.*

1. CALIFORNIA HEALTH AND SAFETY CODE §1363.1 TRANSFERS OR SPREADS POLICYHOLDER RISK BETWEEN THE POLICYHOLDER AND THE INSURER

By attempting to make arbitration mandatory, CIGNA transferred or spread the risk of Muzeyyen Balaban-Zilke's claims, and the enforcement costs connected therewith, from the insurance company to the insured. By interjecting the possibility of a civil trial and jury award for non-compliance with its statute, California has substantially altered the risk assumed by the parties, shifting it back to the insurance company. "To expressly invalidate an agreement contained in the insurance contract touches the core of 'the business of insurance.'" *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co.,* 969 F.2d 931, 933 (10th Cir. 1992). Thus, the requirements of *California Health & Safety Code §1363.1* protects insureds from the insurance companies' attempt to spread the risk and cost of enforcement from the insurance companies to the insureds through compelled arbitration.

CIGNA argues that *California Health & Safety Code §1363.1* does not "substantially affect the risk pooling arrangement between the insurer and the insured" (Pet. brief at page 11), and would therefore fail the second prong of the test articulated in *Kentucky Ass'n of Health Plans v. Miller*, 123 S.Ct. 1471 (2003). While acknowledging that *Miller* was decided in an ERISA context, CIGNA does not acknowledge that this Court "makes a clean break from McCarran-Ferguson factors" in decisions relating to state laws regulating insurance under ERISA's savings clause. *Miller,* 123 S.Ct. at 1479.

CIGNA's conclusory pronouncement that *California Health & Safety Code §1363.1* does not substantially affect the risk pooling arrangement between the insurer and the insured (Pet. brief at page 11) belies its own actions. It is

disingenuous of CIGNA to argue that the consequences of non-compliance with *California Health & Safety Code §1363.1* does not affect their risk, while concurrently pursuing appeals through three courts. (Pet. brief at page 1). Numerous commentators have noted that "insurance premiums . . . rise conversely with an increase in the number of suits brought." Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 Cardozo L. Rev. 1361, 1364 (2003). "General counsels of health care organizations . . . know that litigation driven dispute resolution is a 'hidden culprit' in rising insurance costs." Karl A. Slaikeu and Diane W. Slaikeu, *Confidential from General Counsel to Ceo: "I'm Fed Up, and We're Not Going to Take This Anymore!"*, 5 J. Health Care L. & Pol'y 335 (2002). [Respondent believes the actual effect of litigation of disputes would lower premiums, in that Superior Court Judges are free, while private arbitrators charge $5,000.00 to $7,500.00 per diem].

CIGNA would have this Court believe that not being able to compel arbitration would have no substantial effect on their risk pooling arrangement, yet this issue is worthy of three appeals.

As the Chair of the Subcommittee on the Constitution of the Senate Committee on the Judiciary has observed: "Regrettably, with the help of the federal courts, powerful institutions are subverting Congress' original intention in passing the FAA. Instead of providing disputants with options for dispute resolution, the courts and these institutions are converting arbitration into a tool for the powerful to exert authority over the less powerful. Thus, many people are essentially forced to forgo constitutional rights when disputes arise relating to their jobs, businesses, and finances" [and in Respondent's experience their very lives]. Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 Harv. J. on Legis. 281, 284 (2002).

2. CALIFORNIA HEALTH & SAFETY CODE §1363.1 AFFECTS AN INTEGRAL PART OF THE POLICY RELATIONSHIP BETWEEN THE INSURER AND THE INSURED BY PROTECTING THE POLICYHOLDERS' INTEREST & CONTROLLING THE TERMS OF THE CONTRACT

This Court in *Fabe* specifically held that laws concerning the "end intention or aim of adjusting, managing or controlling the business of insurance came within the meaning of the McCarran-Ferguson Act." *U.S. Dept. of the Treas. v. Fabe,* 508 U.S. 491, 505 (1993). This reasoning is consistent with the purpose of the McCarran-Ferguson Act which was enacted to preserve the states' authority to protect policyholders from overreaching conduct by insurance companies. A state statute aimed at protecting the relationship between the insurer and the insured is the "focus of McCarran-Ferguson." *Fabe,* 508 U.S. at 501. *Fabe*'s reasoning is also consistent with *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). As one District Court noted, this Court made clear that: the "*Fabe* holding . . . is a broader interpretation of the Supreme Court's prior holding in *SEC v. National Securities, Inc.* [citation omitted] Thus, the *Fabe* holding attempts to give meaning to the plain words of the McCarran-Ferguson Act by exempting any state law which directly or indirectly assists policyholders from federal preemption." *Boozell v. United States*, 979 F. Supp. 670, 678 (N.D. Ill. 1997).

"Statutes aimed at protecting or regulating this [policyholder-insurance company] relationship, directly or indirectly are laws regulating the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969); *See also, Zelson v. Phoenix Mut. Life Ins. Co.*, 549 F.2d 62, 68 (8th Cir. 1977) ("the insurer-policyholder relationship is at the 'core' of the insurance business."); *Mathis v. Auto*

Club Inter-Insurance Exchange, 410 F. Supp 1037, 1040 (W.D. Mo. 1976) ("If the state 'has generally authorized or permitted certain standards of conduct' in the insurer-insured relationship . . . [the state] . . . is regulating the business of insurance within the meaning of [the] McCarran-Ferguson Act.")

Expounding upon the holding in *National Securities* in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 215 (1979), this Court stated, "Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured." California's necessitation of clear and prominent disclosure and consent to mandatary arbitration in contracts of insurance was clearly enacted to adjust or manage the enforceable terms of the agreement between the insurer and the insured.

By adjusting or managing the terms of enforcing the agreement, California law has transferred or spread the risk. Under the holding of *Fabe* and other Supreme Court decisions, *California Health & Safety Code §1363.1* was enacted for the purpose of regulating the business of insurance. *See, Unum*, 526 U.S. at 374. (Rule that "has the effect of raising premiums" spreads risk among policyholders.) Here, *California Health & Safety Code §1363.1* provides the enrollee with notice of a potentially offensive arbitration clause prior to enrollment; therefore, the enrollee may competitively opt for a different plan of insurance without this clause [presuming such an option is available]. Hence, there is an inherent business risk to the insurer that the potential enrollee will "vote with his feet," and take his premium dollars elsewhere, thus reducing market share and the available risk pool. This too "spreads or transfers" risk.

Finally, as held in *Unum*, when the two other factors of McCarran-Ferguson are met, it need not be determined

that the 'risk spreading' factor be satisfied. *Johnston v. Paul Revere Life Ins. Co.*, 241 F. 3d 631, 623 n. 9 (8th Cir. 2001) (citing *Unum* at 360.)

3. THE PROVISIONS OF CALIFORNIA HEALTH & SAFETY CODE §1363.1 ARE EXCLUSIVELY LIMITED TO ENTITIES WITHIN THE INSURANCE INDUSTRY

California Health & Safety Code §1363.1 states in pertinent part that: "Any health care service plan that includes terms that require binding arbitration . . ." is the object of its application. Petitioner CIGNA concedes that Respondent "could not have obtained coverage" without signing a mandatory arbitration clause. (Pet. brief at page App. 16). CIGNA admits and recognizes that it is a "health care service plan" within the ambit of this statute and the McCarran-Ferguson Act. (Pet. brief at page 5) *See also, Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355 (2002). Therefore, Petitioner is a legitimate object of the statute's reach.

The statute appears in "Health and Safety Code, Division 2. Licensing Provisions, Chapter 2.2 Health Care Service Plans, Article 4. Solicitation and Enrollment." *West's Annotated California Codes* (2003). By its own clear language and location, the statute is applicable only to health care service plans, and hence limited to entities within the insurance industry.

CONCLUSION

California Health & Safety Code §1363.1 requires clear and prominent disclosure, in statutorily proscribed language, necessitating the consent of an insured to mandatory arbitration in health care service contracts. Under the McCarran-Ferguson Act, the FAA is reverse

preempted because a law of general applicability such as the FAA may not be applied to defeat the state's control in the area of regulating the insurance industry.

This Court has been briefed, and denied review, on this identical issue, *Smith v. PacifiCare Behavioral Health of California, Inc.*, 93 Cal.App.4th 139, 113 Cal.Rptr.2d 140 (2001), *cert. denied*, 537 U.S. 818 (2002) (non-compliance with *California Health & Safety Code §1363.1* bars enforcement of arbitration clause, FAA reverse preempted by McCarran-Ferguson). Though Petitioner has couched its argument in the guise of a split in authority regarding the FAA and the McCarran-Ferguson Act – ERISA, RICO, the SEC, Bankruptcy, Third-party, and the litany of 33 cases and 20 statutes string cited (Pet. brief at pages 5-7) are not the issue(s) presented by this case and therefore should not be considered by this court.

Artfully pled, expensive and exhaustive appellate fighting encouraged by the insurance industry [such as the record here], dissuades many plaintiff's attorneys from accepting otherwise worthy cases. This not only reduces the pool of counsel, but also the actual number of cases prosecuted.

California has recognized that direct democratic lawmaking through the initiative and referendum process is part of a "republican form of government." *In re Pfahler*, 88 P. 270, 150 Cal. 71 (1906). The civil jury, consisting of the sovereign, also represents direct democratic participation, but in the administration of laws and justice. For this reason, California has recognized that the civil trial by jury is the "strongest safeguard of the liberty of the citizen (be he high or low, rich or poor) against encroachments upon his freedom caused by firebrands, demagogues, or regnants exercising their influence over the people through democratic, bureaucratic, or republican forms of

government." *Union Oil Co. of California v. Hane*, 80 P.2d 516, 519, 27 Cal.App.2d 106, 111 (1938).

Review should be granted by this Court, but not on the grounds asserted by Petitioner here. Rather, review should be granted based upon the Republican grounds analyzed under Section I herein. The Federal government, under *9 U.S.C. §2*, empowered State governments, as it was constitutionally required to do, to rely on State standards to revoke contracts of adhesion "upon such grounds as exist at law or equity," whenever those contracts violate an individual's preexisting and superior substantive due process right to choose.

Respectfully submitted,

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Attorneys for Respondent Muzeyyen Balaban-Zilke, Ph.D., Individually and as Successor-in-interest to Brad Zilke

* *Counsel of Record*

DECLARATION OF NIDU PERMAUL

I, NIDU PERMAUL, do hereby declare and state as follows:

1. I am currently employed with the County of Los Angeles ("County"). I have worked for the County for the last thirty-four and one-half (34½) years. I have been the Principal Human Resource Analyst since 1996. For the preceding five (5) years, I was the Assistant Principal Resource Analyst. These positions are in Benefits Administration. My business address is 3333 Wilshire Boulevard, 10th floor, Los Angeles, California.

2. I have first hand personal knowledge of the matters stated herein and could and would competently testify thereto under oath if called as a witness. I make this Declaration in support of the Motion for Reconsideration submitted by CIGNA Healthcare of California, Inc. ("CIGNA") regarding their Petition to Compel Arbitration.

3. My duties as a Principal Human Resource Analyst involve providing day to day supervision of benefit operations including contract administration, communication with employers, participation in the enrollment process and problem resolution, solely with respect to insurance benefits for the County of Los Angeles which has approximately 80,000 employees. As an Assistant Principal Human Resource Analyst, I assisted the Principal Human Resource Analyst in performing the same duties for five years.

4. As part of my job responsibility, I oversee and maintain as custodian the contracts between the County and various health care providers, including CIGNA Healthcare of California, Inc.

5. Attached hereto as Exhibit "A" is a true and correct copy of the complete, executed 1991 Contract between CIGNA HealthCare of California, Inc. and the County of Los Angeles.

6. Attached hereto as Exhibit "C" is a true and correct copy of the complete, executed 1993 Amendments to the 1991 Contract between CIGNA HealthCare of California, Inc. and the County of Los Angeles.

8. Attached hereto as Exhibit "D" is a true and correct copy of the complete, executed 1996 Contract between CIGNA HealthCare of California, Inc. and the County of Los Angeles.

9. Attached hereto as Exhibit "E" is a true and correct copy of the complete, executed 1997 Contract between CIGNA HealthCare of California, Inc. and the County of Los Angeles.

10. In 1992, the County gave all of its new employees a packet of materials upon being hired. This packet included information about the various health plans with which the County had contracted to provide health care benefits to its employees. This packet also included an enrollment application for health care coverage. A true and correct copy of the enrollment application utilized in 1992 by the County is attached hereto as Exhibit "F".

11. The enrollment application utilized by the County in 1992 states, "I understand that I must abide by the provisions of the plan(s) in which I enroll, and that enrollment in Kaiser, some CIGNA plans and ALADS CaliforniaCare or any other County-approved Health Maintenance Organization plan constitutes an agreement to have any issue of medical malpractice decided by

arbitration and waiver of any right to a jury or court trial." (Emphasis added.)

12. At times relevant hereto Department policy has required that once an employee has completed the enrollment application, it is maintained by the County of Los Angeles. The health care provider, such as CIGNA, does not get a copy of the County's signed enrollment application. Furthermore, there were no separate enrollment applications in 1992 to be completed by County employees for CIGNA.

13. The County of Los Angeles only keeps enrollment applications for a period of five (5) years. Thereafter, they are destroyed in the routine course of business. Accordingly, enrollment applications completed in 1992 were destroyed in 1997 pursuant to our departmental policy.

14. In 1992, an employee of the County could not obtain health care coverage until he or she first completed and signed an enrollment application, such as the one attached hereto as Exhibit "F".

15. At or about 1995, the County of Los Angeles began providing health care benefits for domestic partners of its employees. Domestic Partners also completed an enrollment form. A true and correct copy of the Domestic Partner Enrollment and Change Form actually utilized by the County in 1996 is attached hereto as Exhibit "G".

16. The Enrollment Form, which requires the signature of both the County employee and the domestic partner states, "I understand that if I enroll in any HMO plan (such as Kaiser, the CIGNA Medical Group, Network model or Health Access plans; or the FHP/TakeCare HMO or Low Option HMO plans; or the Health Net HMO, etc.)

I waive any right to a jury trial and agree to have any issue of medical malpractice decided by arbitration." (Emphasis added.)

17. No domestic partner would be eligible as of 1996 to receive health care coverage from CIGNA or any other health care provider until he or she first completed and signed the Domestic Partner Enrollment Form, such as the one attached hereto as Exhibit "G". To receive coverage through CIGNA as a domestic partner of a County employee as of 1996, both the employee and domestic partner must have signed an enrollment form such as the one attached hereto as Exhibit "G".

18. I am not at liberty to attach the completed enrollment form of Brad Zilke to this declaration without his (or his representative's) authorization, proper subpoena or court order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 25 day of February, 2000 in Los Angeles, California.

/s/ Nidu Permaul
NIDU PERMAUL

DOMESTIC PARTNER ENROLLMENT AND CHANGE FORM	
Employee Name (Last, First/Initial)	***Employee Number***

If you are enrolling your domestic partner in your medical and/or dental plan, place a "Y" in the Medical and/or Dental column. If you are removing him/her from your medical and/or dental plan, place an "N" in the Medical and/or Dental column(s). (To add domestic partner you must submit a Declaration of Domestic Partnership form and removal requires you to submit a Termination Domestic Partnership form. Call the Benefits Plan Administrator at (310) 397-7220.)

Domestic Partner Name and Information (PLEASE PRINT)			
Name (Last, First/Initial)	***Sex M/F***	***Birth Date***	***Medical Y/N***

Medical Group/Physician Name/Number	***Dental Y/N***	***Dentist No. (Safeguard only)***	***Social Security #***

If you are enrolling a child of your domestic partner, write in the name and other required information below; place a "Y" in the Medical and/or Dental column. To remove a child from coverage, write in the name and date of birth of the child and place an "N" in Medical and/or Dental column.

Name(s) & information of Domestic Partner's Dependent Child(ren) (PLEASE PRINT)			
Name (Last, First/Initial)	***Sex M/F***	***Birth Date***	***Medical Y/N***

Medical Group/Physician Name/Number	***Dental Y/N***	***Dentist No. (Safeguard only)***	***Social Security #***

If you are enrolling a dependent child, you must provide proof that the child is a legal dependant of your domestic partner. This proof must be received by the LA County Benefits Plan Administrator at the address below along with the enrollment form. The following documents are required to certify the dependent status of a child:

Child(ren) . . . . Hospital or state birth certificate or legal adoption papers.

Student(s) . . . . Ages 19 to 25, written certification of full time status from a college or university (e.g., letter from school/school registration).

Disabled child . . . . Certification of total disability by a qualified physician.

I understand that if I enroll in any HMO plan (such as Kaiser, the CIGNA Medical Group, Network model or Health Access plans; or the FHP/TakeCare HMO or Low Option HMO plans; or the Health Net HMO, etc.) I waive any right to a jury trial and agree to have any issue of medical malpractice decided by arbitration.

We declare under penalty of perjury that the foregoing is true and correct.

Domestic Partner Signature _____ Date _____

Employee Signature _____ Date _____

Sign and date this form and mail it with your Declaration *and any required certificates* described above to:

County of Los Angeles Benefits Plan Administrator
P.O. Box 34050
Los Angeles, CA 90034

DECLARATION OF MUZEYYEN BALABAN-ZILKE

I, Muzeyyen Balaban-Zilke hereby declare as follows:

1. I am a party to this action and have personal knowledge of the facts stated herein. If called as a witness, I could and would testify under oath as to the contents of this Declaration.

2. I have been employed by the County of Los Angeles, Department of Children and Family Services since 1992. I enrolled in a CIGNA health care service plan that year and was a member of a CIGNA plan throughout the illness of Brad Zilke, my now deceased husband. Brad was also covered under the plan. Specifically, I obtained medical insurance for Brad and me through a group health plan obtained through my place of employment, beginning in 1992 and continuing year to year thereafter.

3. At no time was I ever given any brochures which disclosed to me that CIGNA used binding arbitration to settle disputes, nor was I told that I was giving up my right to a jury trial by enrolling in a CIGNA health plan. I also do not recall signing any enrollment form on which there was language concerning arbitration and I do not believe I ever saw or signed any such form. Even as of this time, I am unaware of any arbitration language being on any enrollment form provided to me. If such language is on any enrollment form, then it was not conspicuously placed. Had such language been conspicuous, I would have seen it and would have been in a position to object to it or to enroll in another health care plan.

4. Throughout the entire time Brad was ill and unsuccessfully trying to obtain proper care from CIGNA, I was unaware of any contract or agreement which provided

for arbitration. CIGNA never advised Brad or I of the existence of any right to participate in an arbitration proceeding, nor were we told how to initiate such a proceeding, to the extent it may have been available. Neither CIGNA nor any CIGNA representative ever discussed arbitration with me.

5. During the time of our medical coverage disputes with CIGNA, Brad and I had a number of conversations with CIGNA's gatekeeper Victor Gura, M.D. in which he repeatedly mentioned economic concerns as reasons for not authorizing comprehensive follow-up tests for Brad after a mole containing malignant melanoma was removed in 1996. At one point, Dr. Gura said, "What do you think we are, a bank" and "You have cheap insurance and we can't afford to give you a CT scan," and "We don't do this for simple melanomas." Dr. Gura kept fighting us and Brad did not obtain all of the necessary tests. At that time, our focus was on saving Brad's life, and we were in no position to resort to lengthy and expensive litigation in order to obtain the medical coverage benefits which CIGNA should have provided. We were never told that the CIGNA health plan had an arbitration process which could be used to expeditiously resolve medical coverage issues.

6. Although CIGNA declined to authorize certain medical treatment for Brad, it never mentioned any recourse either Brad or I may have had under any arbitration clause. CIGNA did not timely or adequately apprize Brad or I about any availability of arbitration, nor did CIGNA mention arbitration at all. I believe that Brad died because CIGNA and the other defendants failed to timely provide the treatment which Brad needed. Had CIGNA told us that we had recourse to a prompt and informal

means of resolving coverage issues with CIGNA through arbitration, we would have tried to invoke that procedure at a period of time when full and proper treatment could have saved Brad's life. However, I was not aware that CIGNA contended arbitration was an available remedy to Brad or me.

7. It was only after this lawsuit was filed in April, 1999, that I first became aware that CIGNA claimed that an arbitration clause existed which affected my rights and Brad's rights. I first learned this from an attorney which I retained following Brad's death, and not from any CIGNA representative. Prior to that time, I was unaware of any arbitration clause in CIGNA's agreements and I never knowingly consented to have my claims determined by arbitration, nor was I ever advised during Brad's lifetime that arbitration was available to Brad and me to attempt to obtain benefits under the CIGNA health plan or to otherwise vindicate our rights against CIGNA.

8. I have never knowingly consented to having my disputes with CIGNA arbitrated, nor have I consented to give up my right to have a jury hear and determine my claims arising from the death of my husband. As I stated earlier, I was not even made aware of any arbitration clause with CIGNA until after this case was filed.

9. I am informed that CIGNA has relied on a 1998 arbitration agreement in order to attempt to compel arbitration of my individual claims and those I am making as successor-in-interest to Brad. Although Brad died in November, 1998, most or all of the improper conduct and treatment upon which this action is based occurred prior to 1998. I did not retroactively agree to arbitrate disputes with CIGNA based on treatment previously rendered or

other conduct by CIGNA prior to 1998. As of 1998, Brad's medical condition was irreversible. Had I been asked in 1998 or thereafter to agree to arbitration of such claims, and had I understood what was being asked of me, I would have certainly declined.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on January 11, 2000, in Los Angeles, California.

/s/ M. Balaban-Zilke
MUZEYYEN BALABAN-ZILKE